No. 14357

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on October 21, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States. [T. R.[1] pp. 3-4]

On December 7, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on January 12, 1954.

On January 13, 1954, trial was begun in the United States District Court for the Southern District of California by the Honorable Peirson M. Hall, without a jury,

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[1]"T. R." refers to Transcript of Record.

and the appellant was found guilty as charged in the indictment. [T. R. pp. 6-7]

On February 1, 1954, the appellant was sentenced to imprisonment for a period of 18 months and judgment was so entered. [T. R. pp. 11-12] Appellant appeals from this judgment. [T. R. p. 13]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 23190-CD Criminal
[U.S.C., Title 50, App., Sec. 462—
Selective Service Act, 1948]

"The Grand Jury charges:

"Defendant Jack Warren Bradley, a male person within the class made subject to selective service under the Universal Military Training and Selective Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 125, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on May 18, 1953, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [T. R. pp. 3-4]

On December 7, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Peirson M. Hall, United States District

Judge, and entered a plea of not guilty to the offense charged in the indictment.

On January 13, 1954, the case was called for trial before the Honorable Peirson M. Hall without a jury, and on January 13, 1954, appellant was found guilty as charged in the indictment. [T. R. pp. 6-7]

On February 1, 1954, the appellant was sentenced to imprisonment for a period of 18 months in a penitentiary. [T. R. pp. 11-12]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The district court erred in failing to grant the Motion for judgment of acquittal duly made at the close of all the evidence.

B. The district court erred in convicting the appellant and entering a judgment of guilty against him.

IV.

STATEMENT OF THE FACTS.

On September 20, 1950, Jack Warren Bradley registered under the Selective Service System with Local Board No. 125, Los Angeles, California. [F. 1][2]

On October 26, 1951, the appellant filed with Local Board No. 125, SSS Form 100, Classification Questionnaire. [F. 6-13]

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[2]"F" refers to appellant's Draft Board File, Government Exhibit No. 1. At the bottom of each page appears an encircled handwritten number identifying the page in the draft board file.

SSS Form 150, Special Form for Conscientious Objector, was furnished Bradley, and he completed this form and filed it with Local Board No. 125. Bradley claimed to be a conscientious objector because of his religious training and belief. He was classified 1-A on January 22, 1952, and was mailed SSS Form 110, Notice of Classification.

On January 30, 1952, Bradley requested a personal appearance before the Local Board and at the same time appealed his classification. A personal appearance before the Local Board was granted for February 11, 1952. On February 11, 1952, Bradley appeared before the Local Board and was continued in Class 1-A. [F. 36]

Bradley was granted a hearing before the Hearing Officer of the Department of Justice. The Hearing Officer concluded that Jack Warren Bradley was not a conscientious objector by reason of any deep-rooted religious conviction, but that, if his claim was sincere, it was only an outgrowth of his own personal philosophy. He recommended a 1-A classification. [F. 48-49.]

On March 13, 1953, Bradley was classified 1-A by the Appeal Board and he was advised of this action.

On May 4, 1953, SSS Form 252, Notice to Report for Induction, was mailed to Bradley, ordering him to report for induction into the Armed Forces of the United States on May 18, 1953.

On May 18, 1953, Jack Warren Bradley refused to be inducted into the Armed Forces of the United States. [F. 52-55]

V.

ARGUMENT.

POINT ONE.

Replying to Appellant's Assignment of Error, the Government Contends That the Appellant's Refusal to Submit to Induction in Writing Constitutes a Refusal to Submit to Induction Within the Purview of the Indictment and the Appellant Was Properly Convicted.

Reference is made to the Memorandum of Opinion filed by the Trial Judge in the case of *Duron v. United States,* No. 14303, now on appeal to this Court. Judge Westover stated on page 17 of the Transcript of Record in the *Duron* case:

> "When a conscientious objector states emphatically that he will not be inducted into the armed services of the United States, it seems rather useless, and an empty gesture, to require him to stand on his feet and request that he take one step forward when his name and the branch of service into which he has already refused induction are announced.
>
> "Defendant herein is charged in the Indictment with knowingly failing and refusing to be inducted into the armed forces of the United States; and this Court knows of no more emphatic manner in which he could have announced his refusal to be so inducted than by giving the written statement, in his own handwriting, found in his selective service file. The defendant is found guilty as charged."

The appellee contends that the action of the appellant of acknowledging his refusal to submit to induction in writing [F. 53] constitutes a refusal to submit to induction into the armed forces within the purview of the

charge contained in the Indictment and the appellant was properly convicted.

In *Billings v. Truesdell,* 321 U. S. 542, at page 557, the Supreme Court stated:

> "He who reports to the induction station but refuses to be inducted violates Section 11 of the Act clearly as one who refuses to report at all. . . . The Selective Service Regulations state that it is the "duty" of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and 'to submit to induction.' Sec. 633.21(b). Thus it is clear that a refusal to submit to induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status."

POINT TWO.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class 1-A and Its Action Was Neither Arbitrary nor Capricious.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling.

> *Richter v. United States,* 181 F. 2d 591 (9th Cir.);
> *Tyrrell v. United States, supra.*

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service system. The duty to classify and to grant or deny exemptions rests upon the draft boards,

local and appellate. The burden is upon the registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local or appellate board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Every registrant is presumed available for military service and every registrant who fails to establish his eligibility for exemption or deferment to the satisfaction of a local or appellate board is placed in Class 1-A. Title 32, C. F. R., Section 1622.10.

United States v. Schoebel, supra.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations was final.

Estep v. United States, 327 U. S. 114;
Cox v. United States, 332 U. S. 442.

The Selective Service file of the appellant indicates that the Local and the Appellate Boards considered the claims for exemption by the appellant. Both boards rejected the appellant's claim based on the information presented to them. It is noted that the appellant personally appeared before the Local Board and the Hearing Officer at the Department of Justice hearing.

At the personal appearance and hearing conducted by the hearing officer, the demeanor, good faith and sincerity of the appellant in his claims for a conscientious objection exemption were observed.

The recommendation of the Hearing Officer based on his observations and the record was that the appellant's

claims be denied. [F. 36-37] In *United States v. Simmons,* June 15, 1954, ... F. 2d ..... (7th Cir.), the Court stated in this regard that:

> "The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the Board with the impossible task of rebutting a presumption of the validity of every claim based oft times on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption, we may not further inquire as to the correctness of the board's order."

Basis in fact further exists in the selective service file [Govt. Ex. 1] of the appellant. On pages 48-49 facts which could constitute a basis for the appeal board's classification include the following:

(1) The appellant's claims for a conscientious objection exemption stems from his own personal philosophy. [F. 49]

(2) The appellant's claims are neither based on religious training nor religious belief. [F. 49]

(3) The appellant lives in and operates "Brandeis Camp", an outstanding Jewish camp. It is noted that the Jewish doctrines are diametrically opposed to the appellant's personal philosophy of non-participation in war. [F. 36, 48-49]

(4) Appellant believes in the use of force in self-defense [F. 49], but failed to complete his SSS Form 150, Series II, Question 5, stating the limitations or circumstances thereunder.

The appellee submits that this point is related to appellant's next point; accordingly, appellee respectfully directs the Court's attention to its third point, *infra.*

POINT THREE.

There Was No Denial of Due Process of Law Before the Department of Justice Hearing Officer or the Appellate Board of the Selective Service System.

The statute granting the conscientious objector exemption reads as follows:

> "Title 50, App., U. S. C., Section 456(j).
> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is necessary, however, for a person who claims exemption from combatant and/or noncombatant training, to have his claim sustained by the Selective Service System. Thus, a registrant who desires a conscientious objector exemption must satisfy the Selective Service System as

to the validity of his claim for exemption in the following particulars:

(1) He must be conscientiously opposed to war in any form; and

(2) His conscientious objections must be based upon religious training and belief; and

(3) His sincerity, character and good faith assertion of his claims are judged; and

(4) He must make a timely and bona fide claim.

To aid in the determination of the subject's conscientious objections and the validity thereof, the registrant is given a hearing before the Hearing Officer of the Department of Justice. At this time, the Hearing Officer is able to observe the demeanor of the registrant, test his credibility and his good faith and the sincerity of his conscientious objection claims. The registrant is also given an opportunity to be heard and present new evidence.

The appellant infers that the record must substantiate the denial of conscientious objection exemption. The appellee submits that the burden is on the claimant of the exemption to prove by a preponderance of the evidence that he is entitled to such an exemption.

United States v. Simmons, supra.

Furthermore, appellant asserts that the Department of Justice recommendation was based on the appellant's belief in self-defense. This is not true in that the letter of the Department of Justice indicates that the advisory recommendation was based on consideration of the entire file and the record. [F. 49]

POINT FOUR.

There Was No Error in the Department of Justice Inquiry and Advisory Recommendation to the Appeal Board.

Congress has provided for exemption from service in the armed forces of the United States by reason of religious training and belief. However, there is no constitutional right to such an exemption.

United States v. MacIntosh, 283 U. S. 605;

Girouard v. United States, 328 U. S. 61.

Title 50, App., U. S. C., Section 456(j), provides in pertinent part:

> ". . . any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . ."

Under the authority of the above statute, Selective Service Regulations were adopted (Title 32, C. F. R., Sec. 1626.25) and provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each registrant claiming exemption therefor.

Prior to such a hearing, the Hearing Officer mails a Notice of Hearing and Instructions to registrants whose claims for exemptions as conscientious objectors have been appealed. These instructions provide in part:

> "2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing, and before the date set for the hearing, the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being granted to enable the registrant more fully to answer and refute at the hearing such unfavorable evidence."

Since there is no constitutional right to exemption because of religious training and belief, any claimed denial of due process must necessarily, then, be based upon a variance from the procedures established by Congress or by administrative officials under a proper delegation of powers. There was no such variance from the established procedures in this case, and it is noted that these procedures have been held to satisfy the requirements of the Selective Service Act in the case of *United States v. Nugent,* 346 U. S. 1.

Furthermore, procedural irregularities or omissions which do not result in prejudice to the appellant are to be disregarded.

Martin v. United States, 190 F. 2d 775;
Atkins v. United States, 204 F. 2d 269.

VI.
CONCLUSION.

Appellant was properly classified by the Selective Service System and the classification of 1-A was with basis in fact.

There was no denial of due process of law in the classification of the appellant.

There was no error of law in the rulings of the Trial Court and therefore the conviction should be affirmed.

Respectfully submitted,

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